IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 18 Original.

Ex parte: In the Matter of the Petition of THE WILDER'S STEAMSHIP COMPANY for Writ of Mandamus,

vs.

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, the Honorable WILLIAM B. GILBERT, ERSKINE M. ROSS, WILLIAM W. MORROW, Judges thereof,

Respondents.

## BRIEF IN OPPOSITION TO THE ISSUANCE OF THE WRIT.

### Statement of the Case.

This is an application for a writ of mandamus to the Circuit Court of Appeals of the Ninth Circuit requiring it to take jurisdiction of an appeal. An action in admiralty was commenced against the petitioner here, The Wilder's Steamship Company, in February, 1900, in the Circuit Court of

Hawaii. That court rendered a decree in favor of the libellants and against this petitioner on the 7th day of May, 1900, and before the act providing a government for the Territory of Hawaii (Act of April 30, 1900) went into effect. An appeal was taken on the same day to the Supreme Court of Hawaii. On the 9th day of November following, and after the territorial government act had become operative, the latter court entered a final decree, modifying in some respects the decree of the lower court, but still in favor of the libellants. The petitioner here now claims the right of appeal to the Circuit Court of Appeals for the Ninth Circuit. Neither that court, however, nor the Supreme Court of Hawaii has recognized this right; and the Circuit Court of Appeals has expressly refused to entertain the appeal. An order upon the latter court to show cause why this writ should not be granted has issued from this Court. In response to this order and in support of the refusal of the Circuit Court of Appeals to entertain this appeal, we offer the following argument.

## Argument.

The question presented is entirely one of statutory construction. The right to the appeal is claimed under Section 15 of the Act of March 3, 1891, establishing the Circuit Courts of Appeals (26 Stats. at L. 826). This section in connection with Sections 5 and 6 of the same act gives to the Circuit Courts of Appeals appellate jurisdiction over the "Supreme Courts of the several territories" in certain cases. Among these cases are cases in admiralty. It is claimed that these provisions of the act have been extended to Hawaii by the organic act providing a government for this territory (Act of April 30, 1900). That they have no application has been held by the Supreme Court of Hawaii,

and the same conclusion was reached by the Circuit Court of Appeals for the Ninth Circuit in the opinion incorporated in the petition for this writ. We shall summarize the considerations which seem to us to lead irresistibly to the conclusion reached by both of these courts. And we wish to answer a little more in detail that particular argument advanced in support of this application which is based on the peculiar character of this individual case as one in admiralty, a case, therefore, which cannot in future arise in the Hawaiian territorial court proper and never could arise in a state court. As was said by the Circuit Court of Appeals in its opinion refusing to allow the appeal: "The fact that the present case is a suit in admi-
"ralty, and as such would have been within the jurisdiction
"of the District Court created by the act if it had been com-
"menced after the date when the act went into effect, cannot
"affect the question which is before us. The case is purely
"one of the construction of the terms of the act." (Pet. for Writ, p. 25.) But the argument that the case is in any sense a peculiar one, or one not provided for by the terms of the organic act, and that to allow it to be finally determined by the territorial court would be to permit an anomaly which should be avoided if possible as not contemplated by Congress and as inconsistent with the act itself, is, we believe, altogether unsound. We shall give our reasons for this belief after stating briefly the considerations which must in any event govern the decision of this question as a matter of statutory construction.

## I.

**Under the provisions of the Hawaiian Territorial Government Act, the Supreme Court of Hawaii, though in name the Supreme Court of a territory, must be treated for the purpose of determining the right of appeal, as the Supreme Court of a state. Statutory provisions in regard to appeals from the Supreme Court of a territory are not applicable to appeals from this Court. It is so in terms provided in the act, and, in addition, this provision is in harmony with the other provisions of the act, and with local conditions.**

In determining the question whether the laws of the United States in regard to appeals from territorial courts apply to the courts of Hawaii, we shall be called upon to construe various provisions of the organic act. To a clear understanding of the act, a brief summary of the history of the legislation in regard to Hawaii will be necessary.

> "Even in construing the terms of a statute, courts must take notice of the history of legislation and, out of different possible constructions, select and apply the one that best comports with the genius of our institutions, and, therefore, most likely to have been the construction intended by the law-making power."
>
> *Texas etc. Ry. Co.* vs. *Interstate Commerce Commission*, 162 U. S. 197, 218.
>
> "Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it."
>
> *United States* vs. *Union Pacific R. R. Co.*, 91 U. S. 72, 79.

On July 7, 1898, the date of the passage of the joint resolution annexing the Hawaiian Islands, there was in the islands a fully organized republican government, with institutions and laws kindred to our own. The judicial sys-

tem consisted of courts of original and appellate jurisdiction whose powers were defined by a constitution and body of statute laws. The court of general original jurisdiction was called the Circuit Court, and to it was also entrusted jurisdiction over admiralty causes. (Const. Rep. Haw., Articles 82-86; Ballou, Civil Laws of Hawaii, Chap. 80, Secs. 1135, 1136, 1145; Chap. 81, Secs. 1162, 1164; Chap. 92, Sec. 1433.) In such matters, as in other matters, an appeal lay to the court of last resort, or Supreme Court, whose decrees by express provision of the constitution were made "final and conclusive". (Const. Rep. Haw., Art. 86.)

By the joint resolution of Congress and the order of the President made in pursuance of the authority therein conferred upon him, the municipal law of the islands was expressly retained in force and all the officers of the existing government, including the judicial officers, were directed to continue to exercise the same powers with which they were already clothed (30 Stats. at L. 750; Letter of the Sec'y of State to Hon. Harold M. Sewall, July 8, 1898; see report of the Committee on Territories, 56th Cong. 1st Session, House of Rep., Report No. 305, p. 3).

The joint resolution contained the following clauses:

> "Until Congress shall provide for the government of such islands, all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies thus occasioned.
>
> "The existing treaties of the Hawaiian Islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. *The municipal legislation of*

> *the Hawaiian Islands*, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, *shall remain in force until the Congress of the United States shall otherwise determine.*"
> 30 Stats. at L. 750.

The order of the President was as follows:

> " In the exercise of the power thus conferred upon him by the joint resolution, the President hereby *directs that the civil, judicial and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty*, subject to his power to remove such officers and to fill the vacancies."
> Letter of the Sec'y of State, *supra.*

Until the organic act went into effect nearly two years later the law thus declared remained the law of these islands.

In pursuance of the duty imposed upon him by the joint resolution, the President appointed five commissioners to recommend to Congress such legislation in regard to Hawaii as they should deem necessary. This commission subdivided itself into committees and framed a proposed territorial government act. The sections of this act dealing with the judiciary provided for the continuance of the existing judicial system and that the laws providing for the jurisdiction of such courts should "continue in force" except as otherwise provided in the proposed act. They made provision also, however, for a court, to be called the District Court, upon which was to be conferred the same jurisdiction exercised by the Circuit and District Courts of the United States, the jurisdiction of the other courts, called by the act "territorial courts", to be to that extent limited. There followed this provision:

> " The laws of the United States relating to appeals,

writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several states shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

Report of the Hawaiian Commission, Wash. 1898, p. 40.

In regard to this judicial system, the special committee on the judiciary said in its sub-report:

"Hawaii having been hitherto a single independent state, its courts have exercised much of the jurisdiction exercised by both the federal and state courts in this country. In this respect the Hawaiian courts have resembled somewhat the courts of the territories of the United States, which, as a rule, have had much federal jurisdiction, as well as jurisdiction of cases arising under the territorial laws. It seems very desirable in the case of Hawaii to separate these jurisdictions, leaving all cases arising under the laws of the territory to the territorial courts and transferring all jurisdiction of a federal nature to a District Court of the United States to be established for the Territory of Hawaii. This District Court should have, also, the jurisdiction of a Circuit Court of the United States.

"There are many reasons which make this separation of jurisdictions desirable. The foreign shipping already calling at the ports of Hawaii, as well as the shipping from the United States, is very extensive and is rapidly increasing. With the natural growth of commerce on the Pacific, and especially in view of the change in the ownership of the Philippines, the near completion of the Siberian Railway, and the projected Nicaraguan Canal, the shipping that will call at the Hawaiian Islands will undoubtedly increase more rapidly in the future than it has increased in the past. This will give rise to many important admiralty cases in Hawaii, some of which may become matters of international interest.

"It is obviously very desirable that jurisdiction over such cases should be exercised by federal judges. Again, in the event of war, Hawaii may become a center for the trial of prize cases, of which the federal courts

> should have exclusive jurisdiction. By making the relations between the territorial courts of Hawaii and the federal courts, as to appeals, removal of causes, etc., the same as the corresponding relations between the state and federal courts, *all cases of a local nature can be tried and determined finally in the islands, and thus the expense and delay of bringing such cases to the mainland, and possibly to Washington, a distance of 5,000 miles, will be avoided.*"
> Rep. Haw. Com. p. 162.

One of the committee making this report was the Honorable W. F. Frear, who is now the Chief Justice of the Supreme Court of the territory and the writer of the opinion rendered by that Court in the case at bar. This report was incorporated into the report of the Committee on Territories of the House of Representatives to which was referred the bill (56th Cong., 1st session, House of Rep., Report No. 305, p. 20). The act was passed, so far, at any rate, as regards the provisions for the judicial system, substantially in the form in which it was thus presented; and the identical language above quoted in regard to the law governing appeals and writs of error from the territorial courts became a portion of Section 86 of the act as it was made a law. The act was approved April 30, 1900, and became operative on June 15th following.

This provision of Section 86 which we have thus quoted and which was referred to by the judiciary committee of this commission in that portion of its report which we have given, taken in connection with Section 81, to which we shall later refer more particularly and which "continues in force" the final jurisdiction of the Supreme Court except as otherwise provided, plays an important, and indeed to our minds a controlling, part, in the controversy over the right to appeal now claimed. An admiralty case does not belong

to the class of cases in which the United States courts have any supervision over the state courts; nor does any appeal whatever lie from the Supreme Court of a state to a Circuit Court of Appeals. But it is claimed that, nevertheless, the Supreme Court of Hawaii, being the Supreme Court of a territory, is affected by those laws of the United States which provide for appeals from the Supreme Courts of territories, and among them, of course, the act establishing Circuit Courts of Appeals. As appears from the opinion of the Supreme Court of Hawaii, in this case, this claim was boldly rested before that court on the very provision of Section 86 which we have quoted. It was claimed that the word "states" was used in that clause in a sort of generic sense and included "territories", and that therefore by Section 86 itself the courts of Hawaii were made to bear the same relation to the federal courts which both the state and the territorial courts bear. This construction is, however, certainly unnecessary and unnatural. It is perhaps superfluous to cite authority to the point that the word "state" is, under certain circumstances at any rate, to be construed in its narrow sense. Illustrative cases are, however:

*Hepburn* vs. *Ellzey*, 2 Cr. 445, 452;
*New Orleans* vs. *Winter*, 1 Wheat. 91, 94;
*Scott* vs. *Jones*, 5 How. 343, 377.

That in the statute under consideration here the word is to be so construed, is all but self-apparent. We are entirely content to leave that point where it is left by the opinion of the Supreme Court of Hawaii. The reasoning of that court on this subject is indeed unanswerable and seems to have been accepted as conclusive by the petitioner here, for we understand that it is now conceded that the word "state" must be given its strict meaning in this section. The basis

of the argument now made in support of this claim to a right of appeal, as from the Supreme Court of the territory, is found elsewhere than in Section 86; and that section is conceded to be rather an obstacle than an aid in the establishment of the right. We are to consider, then, whether, *in spite of this clause*, the laws of the United States in regard to appeals from the Supreme Courts of territories are applicable to the Supreme Court of Hawaii.

That Hawaii is a territory of the United States is, of course, unquestioned; but that fact alone does not make the provisions of the Circuit Court of Appeals Act in regard to the Supreme Courts of territories applicable. As we have seen, until the organic act went into effect, there was no statute of the United States which had any operation in Hawaii. Until that time Hawaii did not become an organized territory. Its law was its own municipal law and the joint resolution which expressly retained that law in force. At any rate, then, during that period no appeal lay to any court from the decisions of the Supreme Court of Hawaii; nor do we understand that it is now claimed that there was then any right of appeal. Moreover, no statute giving an appeal has become applicable except by virtue of some act of Congress making it so; and no statutes of the United States have in fact ever been extended to Hawaii except in so far as they are so extended by Section 5 of the organic act. This section provides

> "that the Constitution, and *except as herein otherwise provided*, all the laws of the United States which *are not locally inapplicable*, shall have the same force and effect within the said territory as elsewhere in the United States".
>
> Act of April 30, 1900.

The laws of the United States in regard to appeals from

territorial courts are applicable to Hawaii, then, only in case it is not "otherwise provided" in the organic act, and in case those laws are not "locally inapplicable". That it is, however, "otherwise provided" in this act and that these laws, including the provisions of the Circuit Court of Appeals Act in question, are "locally inapplicable", we believe for the following reasons to be clear.

The matter of appeals from the Supreme Courts of territories is regulated by the Circuit Court of Appeals Act and the Revised Statutes. The former provides for appeals in certain specified cases to the appropriate Circuit Court of Appeals. In all other cases in which the amount in controversy exceeds five thousand dollars, an appeal lies to the Supreme Court of the United States.

*26 Stats. at L.*, 826;
*Rev. Stats.*, Sec. 702;
*23 Stats. at L.*, 443;
*Simms* vs. *Simms*, 175 U. S. 162;
*Folsom* vs. *U. S.*, 160 U. S. 121;
*Aztec Min. Co.* vs. *Ripley*, 151 U. S. 79;
*Shute* vs. *Keyser*, 149 U. S. 649.

The relation thus established between the Supreme Courts of territories and the courts of the United States is, of course, widely different from the relation between the Supreme Courts of the various states and the courts of the United States. The courts of original jurisdiction in the states are connected with the United States courts by virtue of the statutory provisions in regard to removal of causes. These provisions are not applicable to courts of original jurisdiction in the territories.

*McCornick* vs. *Western Union Tel. Co.*, 79 Fed. 449.

The Circuit Court of Appeals and the Supreme Court of the United States have a general appellate jurisdiction over

the Supreme Courts of the territories. The state Supreme Courts have on the other hand no direct connection whatever with the Circuit Court of Appeals; and the control over them exercised by the United States Supreme Court is only the limited control given by Section 709 of the Revised Statutes. Can it be said, then, that an act which declares that the relation between the territorial courts of Hawaii and the courts of the United States shall be that of the state courts to the courts of the United States, does not " provide otherwise" than that the laws in regard to appeals from the Supreme Court of a territory to the courts of the United States shall be extended to the Hawaiian courts? We may quote again the clause of Section 86, to which we have already referred. It is as follows:

> "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several states *shall govern* in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

There is a specific provision in the Act, then, that in matters of appeal the Supreme Court of Hawaii is to be "governed" by the provisions of the laws of the United States in regard to appeals from the Supreme Courts of the states. To declare that it is "governed" by those laws is necessarily to exclude the supposition that it is "governed" by the laws in regard to appeals from the Supreme Courts of the territories. A court is not "governed" in matters of appeal by the statute in regard to appeals from state courts, if an appeal is to be allowed which never could be taken from a state court. To declare that a certain law in regard to appeals shall "govern" is to provide, not only that the appeals given by that law shall be allowed, but it is

necessarily to declare also that there shall be no other appeals.

We reach the same conclusion if we apply the other test and seek to ascertain whether these laws are "locally inapplicable". The Hawaiian Islands form a populous and wealthy community and have for generations constituted an independent and sovereign state. They are situated two thousand miles from the mainland and five thousand miles from the capital of the nation. Can that law be said to be "locally applicable" which, in every civil action involving more than five thousand dollars, would give a right of appeal from the final decree of the Supreme Court of these islands to the Supreme Court at Washington?

Though in name a territory, Hawaii stands both historically and legally on a very different footing toward the general government from that occupied by the continental territories. By the organic act a dual system of courts is established as in the various states, and there is no true analogy between the so-called territorial courts of these islands and the courts of the continental territories. It is specially provided that these courts shall bear the same relation to the United States courts in regard to removal of causes and appeals that the courts of the various states of the United States do to their respective federal courts. A statute would not be "locally applicable" which would ingraft on this system, complete as it is and applied to the very locality by name, provisions applicable only to courts constituting a totally different system, which system was devised long before Congress had even thought of the possibility of having to provide government for territories beyond seas.

It is urged, however, that we should apply here those rules of construction which are applicable to the construction

of statutes *in pari materia*; and the doctrine that implied repeals are not favored, is invoked. It is said that the Circuit Court of Appeals Act is not necessarily inconsistent with Sections 81 and 86 of the organic act; and the conclusion is drawn that they should both be allowed to stand. We do not by any means concede that these provisions are not inconsistent. In fact, the contrary seems to us obviously the fact; but we are not called upon to rest our argument on that point. If this statute had said merely that appeals shall be allowed in certain cases, and that all other laws of the United States shall be applicable, questions in regard to the construction of statutes *in pari materia* might become relevant, and it could be urged with propriety that appeals given by other statutes should also be allowed. Or if the acts giving appellate jurisdiction to the Supreme Court of the United States and the Circuit Court of Appeals had been applicable to the Hawaiian court before the passage of the organic act, discussion of the limitations on implied repeals would have some significance. But we are called upon here neither to determine whether there is an implied repeal, nor to construe acts *in pari materia*. We are simply to determine what statutes of the United States have been by Congress extended to Hawaii. Taking the two provisions—that in matters of appeal from the territorial Supreme Court the statutes giving appeals from the state Supreme Courts shall "govern", and that where it is in the act "otherwise provided" or where the laws of the United States are "locally inapplicable" they shall not be extended to Hawaii—we are necessarily driven to the conclusion that the provisions of the statutes of the United States in regard to appeals from the Supreme Courts of territories never became applicable to this territory at all, and were therefore never

the subject of an implied repeal and never became enactments *in pari materia* with the organic act.

Suppose, however, that we are called on to apply the canons of construction which are invoked on behalf of the party seeking to maintain this appeal. Suppose it were true that this court was, prior to the organic act, the Supreme Court of a territory, and that appeals from its decisions could be taken to the Supreme Court of the United States and to the Circuit Court of Appeals, nevertheless there would be still conclusive reasons for the construction of this act, which would now shut the Supreme Court of the territory off from such an appeal. As we have seen, the act bears on its face the evidence that the system established is an exclusive system. It necessarily then repeals so far as Hawaii is concerned any statute establishing a different system. To say that for purposes of appeal the Supreme Court of Hawaii can be treated both as the Supreme Court of a state and the Supreme Court of a territory, is much the same as saying that a thing shall be black and white at the same time. The systems are necessarily inharmonious and cannot both stand. The last enactment must prevail. Again, if the provisions in regard to appeals from continental territorial courts were intended to be still applicable, there would be an irreconcilable conflict in the act itself. For we should have in that case, under this act in effect two Supreme Courts in Hawaii, each, that is to say, supreme in its own jurisdiction, the "Supreme Court" proper, and the federal court or so-called "District Court". In the case of *Coquitlam* vs. *United States*, 163 U. S. 346, this Court said that the so-called "District Court" of Alaska was "the court of last " resort, within the limits of that territory" and "therefore, " in every substantial sense, the Supreme Court of that

" territory." The Court continued (p. 352):

> "The title of the territorial court is not so material as its character. Looking at the whole scope of the Act of 1891, we do not doubt that Congress contemplated that the final orders and decrees of the courts of last resort in the organized territories of the United States—by whatever name those courts were designated in legislative enactments—should be reviewed by the proper circuit court of appeals, leaving to this court the assignment of the respective territories among the existing circuits."

Under the organic act in Hawaii the Supreme Court proper and the District Court is each in its own sphere the court of last resort within the limits of the territory. If the statutory provisions, then, in regard to appeals from the Supreme Courts of territories are applicable to the Supreme Court proper, they must be just as applicable to the District Court; and in addition to the appeals from that court to the Circuit Court of Appeals provided for by Section 86 of the act, we have all the appeals which could be taken if that, too, were the Supreme Court of a territory.

And finally the anomaly would be presented that appeals and writs of error, where there is a diversity of citizenship, would go to the Court of Appeals, while in the absence of such diversity of citizenship, an exactly similar case would come to this Court on appeal or writ of error. In the one case, a single appeal would be given, in the other the right of appealing from an appellate court would be given. The foreigner would not be granted equal privileges of appeal with the citizen.

It is as impossible to believe that such was the intention of Congress, as it is to believe that Congress intended to give an appeal from the Supreme Court of Hawaii to the Supreme Court of the United States in every action in which the

amount in controversy exceeded five thousand dollars. Yet such are the consequences that follow from any line of reasoning which is based on the assumption that the Circuit Court of Appeals Act is applicable to Hawaii. If it ever had been applicable it would necessarily have been repealed, so far as Hawaii is concerned, by the organic act.

We submit, therefore, that the organic act distinctly evidences the intention of Congress to create for the Territory of Hawaii a judicial system which should be, as nearly as possible, the equivalent of the system existing in the sovereign states; that Congress has expressly provided that the laws of the United States dealing with any different system should not be applicable to Hawaii; and that even in the absence of such an express provision, under well settled rules of interpretation, this Court is required to hold that in any event those acts, otherwise applicable, which are no part of the system thus expressly created, are necessarily excluded therefrom.

## II.

**If this Court should be of the opinion that Section 86 has no application to actions pending in the courts of Hawaii at the time the organic act went into effect, such actions must be treated as governed entirely by the municipal laws then in force and no right of appeal under the general laws of the United States can in any event be claimed. The fact that it is an action of such a character that it never could be brought in a state court and is a peculiarly fit subject matter for the jurisdiction of the federal courts, affords no basis, either in law or reason, for the argument made in support of this application.**

The claim made in this case would, we venture to say,

never have been made at all, if it were not for the fact that, while under the new judicial system the territorial court becomes in its relation to the United States courts in effect a state court, this particular action is of such a character that it could never be maintained in any state court and hence seems to be outside of this judicial scheme altogether. It has seemed anomalous that it should by this turn of events be shut out from the course ordinarily followed by admiralty cases whether in the territorial courts or in the federal courts, where alone this kind of action in our judicial system is to be found. An effort has accordingly been made to give some kind of construction to the law, which, as it was thought, would remedy this seeming inconsistency.

As a matter of statutory construction, however, no comfort can be obtained from the fact that appeals in admiralty cases are not provided for in the statutes giving appeals from the decisions of the state Supreme Courts. The fact that no provision for such appeals is there made furnishes in itself no warrant for invoking some other statutory provision. The right to appeal is purely statutory. These statutes do not purport to give a general right of appeal, and the only result of a failure to mention a class is that in cases belonging to that class there is no right of appeal. Such failure affords no basis for the argument that the statute is entirely inapplicable. Congress may apportion the jurisdiction of the territorial courts in any way it pleases and allow such appeals as it sees fit. It is not for a court to supplement these provisions at its pleasure.

As was said by this Court in *Rosencrans* vs. *United States*, 165 U. S. 257, 263:

> "This may be a case of mere omission, but it is an omission which the courts cannot supply."

And again in *Folsom* vs. *United States*, 160 U. S. 121, 127 :

> "It is said that this involves the absurdity that convictions for minor offences are reviewable on a second appeal, while convictions for capital and infamous crimes are not. Doubtless in some cases where the language of a statute leads to an absurdity, hardship or injustice, presumably not intended, a construction may be put upon it modifying the meaning of the words so as to carry out the real intention, *but where the intention is plain, it is the duty of the court to expound the statute as it stands.*"

But if this consideration should lead this Court to the conclusion that Section 86 has no application to pending actions, it by no means follows that the Circuit Court of Appeals Act, as regards such actions, takes the place of that section. On the contrary there are, as we shall see, other express provisions of the organic act which then necessarily control the situation and still exclude the provisions of the Circuit Court of Appeals Act.

Upon the admission of territories into the Union as states and the replacing of the single system of territorial courts by the dual system of federal and state courts, the very situation in regard to existing actions is created which has arisen in Hawaii. The natural question has then presented itself as to the future disposition of actions then pending in the territorial courts, but of a character of which the federal courts and not the state courts would in future have jurisdiction. It is, in a way, anomalous to leave them in the state courts, and so subject only to laws in regard to procedure and appeal applicable to such courts, while newly instituted actions of the same character are brought in the federal courts and so governed by entirely different laws.

A court cannot, as we have said, look elsewhere than to the statutes themselves for the solution of the difficulty thus presented; but it is natural that the legislature itself should deal with the matter, and provide that all actions then pending in the territorial courts of the character thereafter to be entrusted to the federal courts should be removed to the latter courts. Such provisions have in fact been commonly made in the acts forming the continental territories into states.

See *Koenigsberger* vs. *Richmond Silver Mining Company*, 158 U. S. 41.

If in the present instance Congress had been as impressed as the petitioner here with the necessity of getting these cases into the federal courts, it would have been simple and natural to provide directly for it in this way. There was plenty of precedent for such action. Yet Congress, notwithstanding its previous nearly unbroken course in this respect, failed so to provide. There was, however, in this instance, another equally logical solution of the situation. Upon the admission of a territory as a state, the territorial courts necessarily cease to exist, and Congress has no power to provide that they shall retain jurisdiction of pending actions and that such actions shall be carried to conclusion under the old laws and with the old rights of appeal.

*Benner* vs. *Porter*, 9 How. 235.

In the case of Hawaii, however, where the new system as well as the old was entirely under the control of Congress, this course was open to no such objection and was a natural way out of the difficulty. If Section 86 is to be construed as not applying to pending actions, then, it seems to us clear from the other provisions of the organic act to which we

shall now refer the Court, that there is but one alternative construction to the act. Congress has not excepted such actions from the operation of Section 86 without excepting them from the operation of all laws of the United States in regard to procedure and appeal. If Section 86 does not apply, then it is clear that Congress has expressly adopted in regard to pending actions the natural course here suggested and has left *such actions subject exclusively to the old laws in regard to procedure and appeal.*

In Section 81 of the act, it is provided as follows:

> "And until the legislature shall otherwise provide, *the laws of Hawaii* heretofore in force concerning the several courts *and their jurisdiction* and procedure shall continue in force except as herein otherwise provided."

Section 83 provides

> "that the laws of Hawaii relative to the judicial department, including civil and criminal procedure, *except as amended by this act*, are continued in force subject to modification by Congress or the legislature."

Section 1 of the act provides

> "that the phrase 'the laws of Hawaii', as used in this act without qualifying words, shall mean the constitution and laws of the Republic of Hawaii" in force August 12, 1898.

Section 10 reads in part as follows:

> "That all rights of action, suits at law and in equity, prosecutions and judgments existing prior to the taking effect of this act, shall continue to be as effectual as if this act had not been passed. * * * All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii; *all such proceedings, all actions at law, suits in equity and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii.*"

That the word "final" as ordinarily applied to judgments and decrees does not preclude, and is not inconsistent with the existence of a further right of appeal is, of course, true. But, we think it must also be conceded that a stricter meaning may in appropriate cases be given to the term. And this seems to us an eminently appropriate case for such a construction. It would be the assumption of an anomalous condition of things, were this Court to say that as to all actions ended *during* the interregnum between annexation and the passage of the organic act, the Supreme Court of Hawaii had the power to make a decree from which no appeal would lie, but that, as to decrees entered *after* the organic act was passed, the power of the court to make such decrees should cease, notwithstanding the fact that the only expression of the will of Congress on this subject is found in the clauses of that act which confirm to that court the power of final determination of causes as given to it by the Hawaiian constitution and authorize it to carry them " on to final judgment and execution". There is no reasoning, therefore, which leads to the conclusion that pending actions were excepted from the operation of section 86 which does not lead equally to the conclusion that they are excepted from the operation of the Circuit Court of Appeals Act and are to be prosecuted to final judgment in those courts, and those courts alone, in which they would have been so prosecuted to judgment if the Act had never been passed. If such actions are not governed by Section 86 it is because, and only because, they are not governed by *any* of the laws of the United States in regard to procedure and appeal but are governed exclusively by the old municipal law of Hawaii.

It is inconceivable that Congress should have intended to

grant to the limited class of pending actions rights of appeal which existed neither under the old system nor under the new. Such an intention would have to appear by the most unequivocal language before it could be credited. The actual language of the statute, however, not only admits of no such construction, but contains a clear expression of the will of Congress to the contrary. The organic act provided in terms that the jurisdiction given to the Supreme Court of Hawaii *by the Constitution* of Hawaii should "*continue in force* except as herein otherwise "provided". There is nothing in the act which "otherwise provides" except Section 86 and that section is explicit as to the jurisdiction given to the District Court, the Circuit Court of Appeals and the Supreme Court of the United States. Whatever of jurisdiction originally granted by the Constitution and laws of Hawaii to the Supreme Court of Hawaii, was not taken away by Section 86, necessarily remained in that court. Every cause which that court had the right to finally and conclusively determine under the Constitution of Hawaii, it had a like right, given to it by the organic act, to finally determine under the new act, provided it was not one of those cases apportioned to the new jurisdiction by Section 86. Actions at law and in equity, not removable by appeal or otherwise, under that section, were left for final determination to the original Hawaiian Supreme Court. The intention of the statute is apparent, not merely from the words thus shown to have been used, but also from the conditions existing at the time of the adoption of the organic act. We have seen that at the date of the passage of the joint resolution, Congress acted with reference to a fully organized government, one which, in almost all respects, was as full and complete as that of a state in our

Union. Its complete system of courts of original and appellate jurisdiction, to which had been entrusted under the old municipal law the hearing and final determination of actions of all kinds, including those represented by the case at bar, was preserved by this act. It was a system in harmony with our own institutions. It had been administered, in large part at least, by those of the same blood with ourselves. It looked to the same sources for its jurisprudence as do our own courts. For the preceding two years, during which the islands had been an integral part of our domain, its tribunals had under the expressed will of Congress and the positive direction of the President, been the sole tribunals for the administration of justice in the islands. There remained only to leave to that system, and that system alone, all pending actions, in order to bridge over completely and adequately the transition between the old system and the new.

With this reasonable construction given to the statute, the whole argument based on the peculiar character of this case as an action in admiralty falls to the ground. It may be true that the act recognizes this class of cases as being a class which in future should be entrusted to the United States courts. But it also recognizes that those courts which had theretofore been fit tribunals for their final determination, remained such as regards actions which might be then pending before them. Again it may be true that a system of appeals which treats the territorial courts as state courts is obviously framed without regard to possible admiralty causes pending in those courts. But that fact only tends to confirm that construction of the statute which leaves all provisions of the United States laws in regard to appeals altogether inapplicable to pending actions. The

omission to provide for a second appeal in an admiralty case pending in the Hawaiian court at the date of the passage of the organic act is not of itself an argument against the truth of our contention regarding the intention of that act. In *McNulty* vs. *Batta*, 10 How. 71, this Court held that on the admission of Wisconsin as a state and the creation by the state and by Congress of the dual system of courts, this Court lost jurisdiction of a cause then pending before it, of which it had gained jurisdiction by writ of error to the Supreme Court of the territory. No provicion had been made in the laws creating the new system whereby the jurisdiction should be preserved.

We may add in closing, however, that even though the new system is to go into force as regards pending actions, and apart from the fact that in any event the statute plainly denies the right of appeal which it is here sought to invoke, we cannot see that there is anything unjust or arbitrary or absurd in this limitation on the right to appeal. There is nothing in the nature of the Supreme Court of Hawaii which makes it an unfit tribunal for the final determination of actions in admiralty. If while Hawaii was a republic and even during the period after its annexation, but before the territorial act went into effect, the territorial courts were proper courts for the final decision of admiralty cases, there is no warrant either in the organic act or out of it for the belief that they immediately became unfit. And the statute is not rendered less inharmonious by the solution which is offered by those seeking this appeal. They get their appeal, but the appeal involves an inconsistency at least as great as that involved in the refusal of it. A defeated litigant has no inalienable right to carry his lost cause to two successive appellate tribunals; and a court would be little

inclined to give him that right when other parties similarly situated have only one appeal. The losing party in an admiralty cause in the District Court under the new regime will have but one appellate court to which he can take his case. The appellant here has already had a hearing before one appellate tribunal. There is no reason in the nature of things why he should have another. On the contrary, there is every reason in logic and common sense for allowing this case to follow with its associates on the dockets of the Hawaiian courts at the time the organic act went into effect, the orderly course to final determination which it would have followed if the act had never been passed.

Whether, however, we are to construe Sections 10 and 81 of the organic act as providing that, as regards pending actions there shall be no appeals in any case beyond the Supreme Court of the territory; or as providing merely that they may be prosecuted to judgment there, and that there shall then be such further appeal as the act allows, our conclusion must be the same. For under Section 86 the appeals allowed by the act are given in those cases only in which the Supreme Court of the United States can exercise appellate jurisdiction over the Supreme Court of a state. The case involved here, is not such a case; and since the statute gives no appeal, no consideration of convenience can overcome its effect. We submit that this is not a case for the exercise of the appellate jurisdiction of the Circuit Court of Appeals.

## III.

**No appeal lay in any event to the Circuit Court of Appeals for the Ninth Circuit at the time when notice of appeal was given after the final decree of the Hawaiian Court. At that time Hawaii had not been assigned by this Court to that Circuit.**

This point of our argument is intended to apply solely to the lack of jurisdiction which existed at the time when the petitioner attempted to take an appeal by action before the Hawaiian court. The present application is not for a writ commanding the Circuit Court of Appeals to allow an appeal, but commanding it to set aside its order refusing to allow such appeal and to proceed to "hear and decide" the cause "on its merits" (Pet. for Writ, p. 12). Consequently, if the proceedings in the Hawaiian court relied upon as accomplishing an appeal did not in fact create an appeal, the writ applied for must be denied. Nothing can be clearer than the proposition that there must be a right and duty in the court claimed to be the appellate court to hear and decide, and that this right and duty must exist at the time at which the initial proceedings on appeal are taken. When the notice of appeal was given in the case at bar and other action taken intending an appeal to the Circuit Court of Appeals for the Ninth Circuit, that court was not an appellate court as to any suits then depending in the Supreme Court of Hawaii. This Court, to which Congress had delegated its own power of assigning territories to the various circuits for the purpose of hearings on appeal from territorial courts, had not then acted with reference to Hawaii. Its failure to act in this regard was, legally, a failure on the part of Congress to provide an appellate jurisdiction for that territory. The subsequent action of this

Court could have no greater effect than a subsequent Act of Congress giving a right of appeal. Such right would be operative from the date of the new act, but it would not validate an appeal attempted to be taken before the act gave the right to appeal. It is the familiar doctrine of this Court that the right of appeal is a statutory one. It does not exist unless it is conferred. Indeed, in the case already cited, *McNulty* vs. *Batta*, 10 How. 71, the right may be taken away from this Court to proceed to judgment upon an appeal perfected and actually pending before it. If then, the proceedings before the Supreme Court at Hawaii did not create an appeal because at that time there was no appellate court, the subsequent action of this Court in assigning Hawaii to the Ninth Circuit was not retroactive in its effect. It had force only as to appeals thereafter to be taken.

The Circuit Courts of Appeals of the nine circuits do not constitute a single court. In the absence of the assignment by this Court of Hawaii to the Ninth Circuit, there was no more right in the petitioner to select it as an appellate court than there was to select the Circuit Court of Appeals for the first, or any other circuit.

We have purposely confined our argument on this point to the effect of the proceedings shown by the petition to have been taken at Hawaii. It is our understanding that when similar proceedings were sought to be taken before the Circuit Court of Appeals of the Ninth Circuit, the petitioner had already (though after the Hawaiian Court had denied the appeal) applied to this Court for an assignment of the Territory. On the hearing before the Circuit Court of Appeals it was suggested by the petitioner that a continuance might be proper until this Court should act.

It was agreed, then, that the hearing should proceed, and that such action as this Court might take regarding the assignment should be deemed as having been taken before the hearing referred to. Whatever legal effect may be attributed to this understanding, whatever right may have accrued to the petitioner if the assignment had been made by this Court prior to the hearing in the Court of Appeals (it being remembered, however, that such assignment was not applied for until after the "perfecting of the appeal" in the Hawaiian Court), we desire that the benefit of the understanding or right should be preserved to the petitioner.

## IV.

**The determination by the Circuit Court of Appeals of the Ninth Circuit that it had no jurisdiction of this appeal was a judicial determination which cannot be reviewed by mandamus.**

While mandamus will lie to compel a court to hear and determine a case properly within its jurisdiction, it will not lie to compel the court to determine in a particular way, any of the questions involved in that case.

*In re Nininger*, 150 U. S. 150;
*American etc. Co.* vs. *Jacksonville etc. Ry. Co.*, 148 U. S. 372;
*Ex parte Brown*, 116 U. S. 401;
*Ex parte Newman*, 14 Wall. 152.

If the Circuit Court of Appeals had refused the petitioner in this case any hearing whatever it might doubtless have been compelled by mandamus to grant the hearing. But that is the full extent to which the writ could go. If the court had then given the matter judicial consideration and after full examination of the statutes involved had deter-

mined that those statutes when properly construed gave the petitioner no right of appeal, and had accordingly dismissed the appeal, mandamus would not lie to review that decision. Yet that is precisely what the Circuit Court of Appeals for the Ninth Circuit has done. The petitioner has submitted the question of its right of appeal to the court. The court has accorded a hearing, and after consideration has determined judicially that the appeal will not lie at all. This decision may possibly be reviewed by *certiorari*, but to review it by mandamus it seems to us would be to compel the court to decide a judicial question in a particular way.

The petitioner, believing that it had a right to appeal to the Circuit Court of Appeals, and that the proceedings taken by it in the Supreme Court of Hawaii were not sufficient to perfect that appeal, might have applied to any judge of the Circuit Court of Appeals for the Ninth Circuit for the allowance of an appeal. If these judges had all in turn refused to perform what is perhaps the merely ministerial act of allowing the appeal, they could doubtless be compelled by mandamus, if the right to appeal exists, to allow the appeal. The petitioner, however, goes before the court itself and asks for a judicial determination of its right. The court grants the hearing and gives the matter consideration and makes its determination. It surely has the power to determine, in the first instance, at any rate, the limits of its own jurisdiction, and in doing so it exercises one of the first prerogatives of every court. Such determination is in the highest sense a judicial determination. Can it be compelled by mandamus to reach the opposite conclusion?

Nor do we think the case of *Ex parte Parker*, 131 U. S. 221, relied on by petitioner, is at variance with our conten-

tion. The appeal there ordered to be reinstated was one which had been taken to the Supreme Court of a territory, "but dismissed for alleged irregularities in taking it". A different method of reviewing the decision of a Circuit Court of Appeals in a similar case is illustrated by the much more recent case of

*Mutual Life Ins. Co.* vs. *Phinney*, 178 U. S. 327,

in which the aggrieved party obtained full relief by *certiorari*. But in any event the action of a court in dismissing an appeal for "*alleged irregularity in taking it*", presents a very different case from its action in dismissing it on the grounds that in such cases *the statutes have conferred upon it no appellate jurisdiction whatever*. It has been repeatedly held that the decision of a Circuit or District Court on a plea to its jurisdiction is not to be reviewed by mandamus. We can see no difference between such a case and the case presented here.

*In re Lehigh etc. Co.*, 156 U. S. 322;
*Morrison* vs. *District Court*, 147 U. S. 14;
*Ex parte Baltimore etc. R. R. Co.*, 108 U. S. 566.

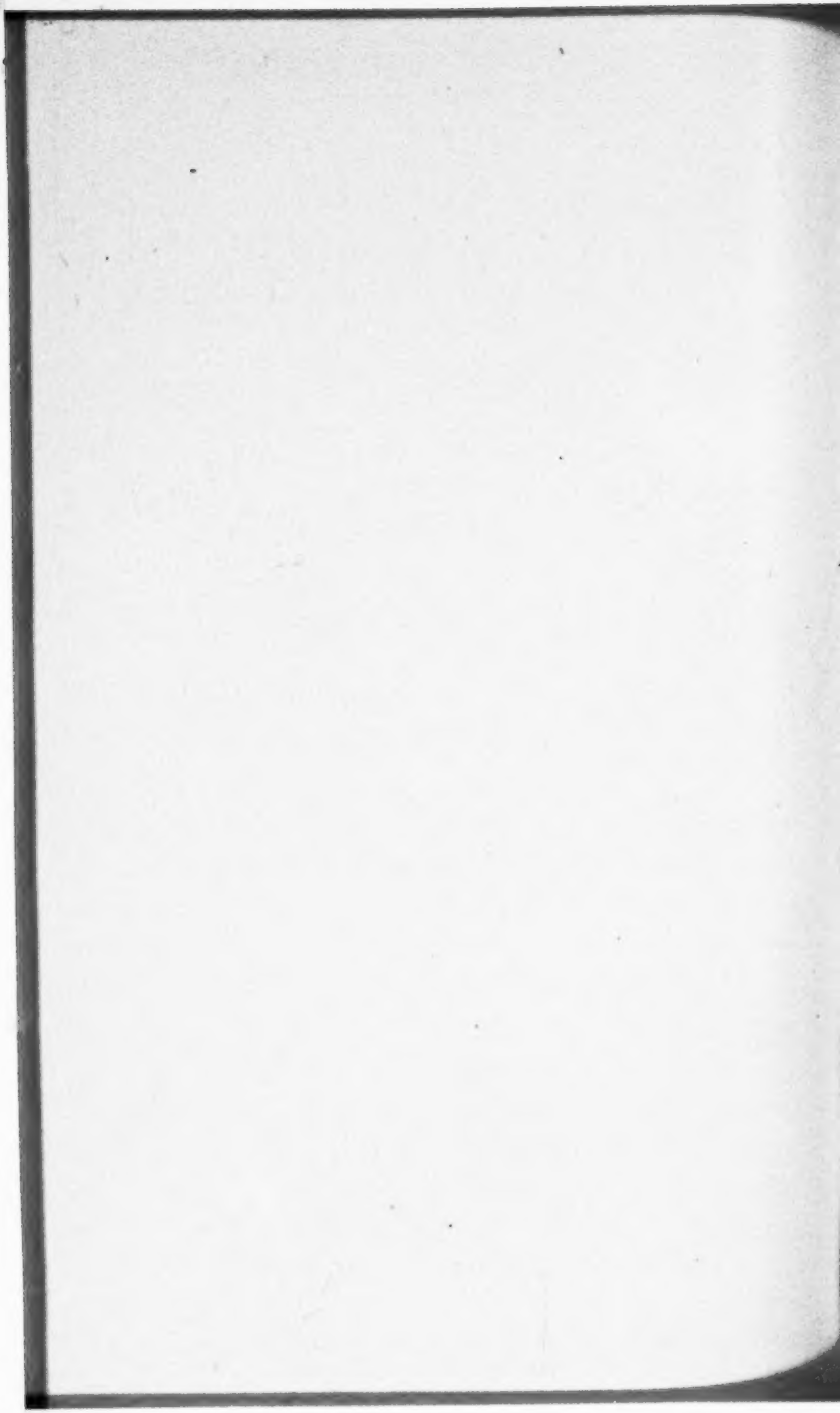
The various Circuit Courts of Appeal have been called upon many times since that court was established to define the limits of its jurisdiction. We do not, however, find any reported case in which it has been sought to control their determination of that question by mandamus from this Court.

> "It may be said generally, that, where the court, acting in a judicial capacity, has dismissed an appeal from an inferior tribunal, its order of dismissal is regarded as a judicial determination of the question, and, however erroneous, it is final and conclusive, and its correctness will not be questioned by mandamus."
> *High, Extraordinary Legal Remedies*, Sec. 191;
> *Ex parte Newman*, 14 Wall. 152.

For the various reasons given in the foregoing brief, we submit that the application for a writ of mandamus should be denied.

Respectfully submitted,

CHARLES PAGE,
EDWARD J. MCCUTCHEN,
C. H. LINDLEY,
HENRY EICKHOFF,
PAUL NEUMANN,
Attorneys for Hind *et al.*



IN THE

# Supreme Court of the United States.

| | |
|---|---|
| In the Matter of the Petition of the WILDER'S S. S. COMPANY, For Writ of Mandamus. | No. 18, Original. |

## Return of the United States Circuit Court of Appeals for the Ninth Circuit to order to show cause.

The return of the United States Circuit Court of Appeals for the Ninth Circuit and of William B. Gilbert, Erskine M. Ross and W. W. Morrow, the judges of said Court, to the order of this Honorable Court requiring them to show cause why a writ of mandate should not issue in the above entitled cause, respectfully presents to the Court:

1. That the matters and things set out in the petition on file herein duly came before the said Circuit Court of Appeals for adjudication as to whether or not the said Court had jurisdiction to entertain an appeal in the cause in the petition referred to from the final judgment of the Supreme Court of Hawaii and that the right of the said petitioner to appeal in the matter mentioned to the said Court and to have the same heard by it, was judicially determined by

said Court, and a final order made thereon denying that it had such jurisdiction.

2. That from the matters and things in said petition set forth, it appeared and does appear that the said Circuit Court of Appeals did not have jurisdiction of the said cause on appeal.

3. That the said Circuit Court of Appeals did not and does not have jurisdiction on appeal in admiralty cases from the Supreme Court of the Territory of Hawaii, which cases were pending in said Court at the date when the Act of Congress of April 30, 1900 went into effect.

4. That the said Circuit Court of Appeals properly decided on the facts set out in the said petition that said Court had no jurisdiction to proceed in the said matter and that its decision and order in the said matter constituted a final judgment therein which is properly subject to review by this Honorable Court by writ of certiorari.

WHEREFORE, the respondents, the said Circuit Court of Appeals for the Ninth Circuit and the Judges of said Court, pray that the matters aforesaid be determined according as to law and justice may appertain.

For the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

WM. W. MORROW,
Resident Circuit Judge.

Seal
Attest
F. D. Monckton

# Supreme Court of the United States.

No. 9, Original.—October Term, 1901.

The Wilder's Steamship Company, petitioner. } Petition for mandamus.

This was a petition by the Wilder's Steamship Company, a corporation organized and existing under the laws of the Territory of Hawaii, for a writ of mandamus to the United States Circuit Court of Appeals for the Ninth Circuit to entertain an appeal from the Supreme Court of the Territory of Hawaii.

On December 27, 1899, the steamer Claudine, one of the petitioner's steamships, came into collision with the barkentine William Carson. On February 5, 1900, the owners of the William Carson and of her cargo filed a libel in admiralty against the steamship company in the circuit court of the first judicial circuit of the Republic of Hawaii. On May 7, 1900, that court rendered a decree against the steamship company in the sum of $55,000, upon the ground that the collision was caused by the fault of the steamship company, with no fault or negligence on the part of those in charge of the William Carson. From that decree an appeal was taken to the Supreme Court of the Republic of Hawaii, as provided by the then existing law of the Republic. On November 9, 1900, the cause having come on regularly to be heard before the Supreme Court of the Territory of Hawaii, the decree was affirmed by that court. On the same day, an appeal was claimed from that court to the United States Circuit Court of Appeals for the Ninth Circuit, but was denied, for want of jurisdiction, by the Supreme Court of the Territory on November 7, 1900, and by the Circuit Court of Appeals on April 1, 1901. 13 Hawaii, 174; 108 Fed. Rep. 113.

On March 5, 1901, the steamship company presented to this court a petition praying that an order, under section 15 of the act of March 3, 1891, c. 517, assigning the Territory of Hawaii to the Ninth Circuit, might be made *nunc pro tunc* as of June 15, 1900, the date at which the act of Congress of April 30, 1900, c. 339, entitled "An Act to provide a government for the Territory of Hawaii," took effect.

On April 12, 1901, the petitioner filed in this court a petition praying for a similar order, and further praying that a writ of mandamus might issue to the United States Circuit Court of Appeals for the Ninth Circuit to set aside its order denying the appeal, and to entertain the cause.

On April 15, 1901, this court "ordered that the Territory of Hawaii be, and it is hereby, assigned to the Ninth Judicial Circuit under section

15 of the Judiciary Act of March 3, 1891;" gave leave to file this petition for a writ of mandamus; and awarded a rule to show cause, returnable on May 13.

On May 3, after that order, the petitioner presented to the Circuit Court of Appeals for the Ninth Circuit another petition for the allowance of an appeal from the decree of the Supreme Court of the Territory of Hawaii; and that petition was denied.

On May 13, the Circuit Court of Appeals for the Ninth Circuit made a return, that upon the facts stated in the petition it had not jurisdiction of the appeal: that the question whether it had such jurisdiction came before it for adjudication and was judicially determined; and that its decision in the matter constituted a final judgment, properly subject to review in this court by writ of certiorari.

The case was submitted to this court upon the petition for a mandamus, the return thereto, and a motion of the petitioner to file in evidence its petition of May 3 to the Circuit Court of Appeals and the disallowance thereof.

The Republic of Hawaii, before its annexation to the United States, had a fully organized government. The judicial system consisted of courts of original and appellate jurisdiction, whose powers were defined by the constitution and statutes of the Republic. The circuit courts were the courts of general original jurisdiction, and had power to determine all civil causes in admiralty. In such causes, as well as in other cases, the Supreme Court had appellate jurisdiction, and its decrees, by express provision of the constitution, were made "final and conclusive." Constitution of Hawaii, arts. 82–86. Ballou's Civil Laws of Hawaii, 1897, §§ 1105, 1136, 1144, 1145, 1164, 1430, 1433, 1434.

By the Joint Resolution of the Congress of the United States of July 7, 1898, c. 55, the Hawaiian Islands were annexed to the United States, and it was provided that "until Congress shall provide for the government of such islands, all the civil, judicial and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons and shall be exercised in such manner as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies thus occasioned;" and that "the municipal legislation of the Hawaiian Islands," "not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." 30 Stat. 750.

On July 8, 1898, "in the exercise of the power thus conferred upon him by the Joint Resolution, the President hereby directs that the civil, judicial and military powers in question shall be exercised by the officers of the

Republic of Hawaii as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill the vacancies." Letter of Secretary of State to Minister Sewall; Report 305, H. R. 56th Congr. 1st sess. p. 3.

On August 12, 1898, the sovereignty of the Hawaiian Islands was transferred to the United States. The act of Congress of April 30, 1900, c. 339, entitled "An Act to provide a government for the Territory of Hawaii," which by its terms took effect June 15, 1890, declared in § 1 that the phrase "the laws of Hawaii," as therein used, should mean the constitution and laws of the Republic of Hawaii in force at the date of that transfer; and in § 2 that the islands so acquired should be known as the Territory of Hawaii; and contained the following provisions:

"SEC. 5. The Constitution and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable shall have the same force and effect within the new Territory as elsewhere in the United States."

"SEC. 6. The laws of Hawaii not inconsistent with the Constitution or laws of the United States or the provisions of this act shall remain in force, subject to repeal or amendment by the legislature of Hawaii or the Congress of the United States."

Section 7 repealed the constitution and various laws of the Republic of Hawaii, including those on maritime matters. 31 Stat. 141, 142.

"SEC. 10. All rights of action, suits at law and in equity, prosecutions and judgments existing prior to the taking effect of this act shall continue to be as effectual as if this act had not been passed." "All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii; all such proceedings, all actions at law, suits in equity, and other proceedings, then pending in the courts of the Republic of Hawaii, shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii; and all process issued and sentences imposed before this act takes effect shall be as valid as if issued or imposed in the name of the Territory of Hawaii." 31 Stat. 143.

"SEC. 81. The judicial powers of the Territory shall be vested in one supreme court, circuit courts, and in such inferior courts as the legislature may from time to time establish. And until the legislature shall otherwise provide, the laws of Hawaii heretofore in force concerning the local courts and their jurisdiction and procedure shall continue in force, except as herein otherwise provided."

"SEC. 83. The laws of Hawaii relative to the judicial department, including civil and criminal procedure, except as amended by this act, are continued in force, subject to modification by Congress or the legislature." 31 Stat. 157.

"SEC. 86. There shall be established in said Territory a District Court to consist of one judge, who shall reside therein and be called the District Judge. The President of the United States, by and with the advice and consent of the Senate of the United States, shall appoint a district judge, a district attorney and a marshal of the United States for the said district, and said judge, attorney and marshal shall hold office for six years unless sooner removed by the President. Said court shall have, in addition to the ordinary jurisdiction of District Courts of the United States, jurisdiction of all cases cognizable in a Circuit Court of the United States, and shall proceed therein in the same manner as a Circuit Court; and said judge, district attorney and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys and marshals of District and Circuit Courts of the United States. Writs of error and appeals from said District Court shall be had and allowed to the Circuit Court of Appeals in the Ninth Judicial Circuit in the same manner as writs of error and appeals are allowed from Circuit Courts to Circuit Courts of Appeals as provided by law; and the laws of the United States relating to juries and jury trials shall be applicable to said District Court. The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States, shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii." 31 Stat. 158.

[January 6, 1902.]

Mr. Justice GRAY, after stating the case as above, delivered the opinion of the Court.

We are of opinion that the appeal from the Supreme Court of the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit was rightly disallowed.

The libel in admiralty was originally brought, and a decree made, in a court of the Republic of Hawaii having jurisdiction of the cause, and an appeal from that decree was duly taken to the Supreme Court of Hawaii, as provided by the then existing law of the Republic. While the appeal was lawfully pending in the courts of Hawaii, Congress, by the act of April 30, 1900, c. 339, provided a government for the Territory of Hawaii, establishing therein a Supreme Court and other courts, and enacting, in section 10, that "all actions at law, suits in equity, and other proceedings, then pending in the courts of the Republic of Hawaii, shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii." This appeal in admiralty was one of the "other pro-

ceedings" then pending in the courts of the Republic of Hawaii, which were "to be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii." On November 9, 1900, the cause having come on regularly to be heard before the Supreme Court of the Territory, in accordance with the act of Congress, the decree below was affirmed; and on the same day an appeal from the decree of affirmance was claimed to the United States Circuit Court of Appeals for the Ninth Circuit.

The act of Congress of 1900 contains no provision authorizing such an appeal. The petitioner refers to section 86 of that act, which established in the Territory a District Court of the United States with the powers of a Circuit Court of the United States. But that court is given no appellate urisdiction. The provision allowing writs of error and appeals from that court to the Circuit Court of Appeals for the Ninth Judicial Circuit does not touch appeals from the Supreme Court of the Territory of Hawaii. And the remaining clause as to appeals, writs of error, removals of causes and other matters and proceedings between the courts of the United States and the courts of the Territory of Hawaii provides that they shall be governed, not by the laws applicable to other Territories, but by the laws of the United States as to such matters and proceedings "as between the courts of the United States and the courts of the several States." Congress may have considered that, owing to the great distance of the Territory of Hawaii from the continent, the appellate jurisdiction over that Territory should be more restricted than over other Territories, and should extend only, as in the case of the several States, to judgments against a right claimed under the Constitution, laws or treaties of the United States. But whatever may have been the reasons which influenced Congress, its language is too plain to be misunderstood. Cases in admiralty, brought after the act of 1900 took effect, must of course be brought in the District Court of the United States, and subject to the right of appeal therein provided to the Circuit Court of Appeals for the Ninth Circuit. But as to cases in admiralty pending in the courts of Hawaii when the act took effect, there is no special provision, and they therefore remain, like other civil cases, to be finally determined in the courts of the Territory of Hawaii, under the general provision of section 10. In cases in admiralty, as in all other cases pending in the courts of Hawaii at that time, it was within the discretionary power of Congress to provide that they should remain within the jurisdiction and determination of the courts of the Territory; and it has clearly so provided as to pending suits of all classes. The fact that in a State cases in admiralty cannot be brought in its courts, but only in the courts of the United States, affords no reason for implying that Congress, without any language expressing such an intention, meant to vest in any

court of the United States either original or appellate jurisdiction in cases in admiralty pending in the courts of Hawaii when this act of Congress took effect.

Reliance is placed by the petitioner on section 15 of the act of March 3, 1891, c. 517, (long before the annexation of Hawaii,) establishing Circuit Courts of Appeals, which provides that "the Circuit Court of Appeal, in cases in which the judgments of the Circuit Courts of Appeal are made final by this act," (which include cases in admiralty,) "shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders and decrees of the District Court and Circuit Courts; and for that purpose the several Territories shall, by orders of the Supreme Court, to be made from time to time, be assigned to particular circuits." 26 Stat. 830. But on November 9, 1900, when this appeal to the Circuit Court of Appeals for the Ninth Circuit was claimed from the Supreme Court of the Territory of Hawaii, as well as on April 12, 1901, when this petition for a writ of mandamus was filed, this court had made no order assigning the Territory of Hawaii to any judicial circuit. The order made by this court on April 15, 1901, assigning the Territory of Hawaii to the Ninth Judicial Circuit, was not, as this petitioner requested, made as of a former day, but took effect only from its date. And no order of this court, assigning the Territory of Hawaii to a judicial circuit under the act of 1891, can give a right of appeal inconsistent with the provision of section 86 of the later act of 1900 restricting such appeals to cases in which by the laws of the United States they are allowable to the courts of the United States from the courts of the several States.

*Petition dismissed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*